

STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH
DOCKET NO. SP-13243, Sub 0

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of Requests for Declaratory)	SECOND SUPPLEMENTAL
Rulings of GESS RNG Biogas USA, LLC)	AND AMENDED REQUESTS
(successor in interest in this matter to GESS)	FOR DECLARATORY RULINGS
International North Carolina, Inc.))	

Pursuant to North Carolina Utilities Commission (“Commission”) Rule R1-5, Petitioner GESS RNG Biogas USA, LLC¹ (“GESS RNG” or “Petitioner”) hereby submits these Second Supplemental And Amended Requests Declaratory Ruling (the “Second Amended Requests”) to supplement and amend the Supplemental and Amended Requests for Declaratory Ruling (the “Amended Requests”) filed in Docket No. SP-13243, Sub 0 on March 1, 2019.²

GESS RNG respectfully requests that the Commission issue declaratory rulings that, by virtue of the proposed activities of GESS RNG described below:

(1) GESS RNG will not be a “public utility” within the meaning of N.C. Gen. Stat.

§ 62-3(23)(a);

¹ Petitioner GESS RNG Biogas USA, LLC is successor in interest in this matter to GESS International North Carolina, Inc., the original Petitioner, which joins in this filing to the extent deemed necessary by the Commission. Effective prior to the date of this filing, GESS International North Carolina, Inc. assigned and transferred all of its rights and interests in this matter and in Docket No. G-9, Sub 728 (including interests in the Order Approving Participation in Pilot Program with Conditions entered on March 11, 2019 in Docket No. G-9, Sub 728) to GESS RNG Biogas USA, LLC.

² This filing supplements and amends the Amended Requests filed in this Docket on March 1, 2019 (*Exhibit 1*), and incorporates by reference the documents and information submitted in support of the Amended Request and as Responses to Commission Request for Information (*Exhibit 2* [GESS RNG] and *Exhibit 3* [PNG]) to the full extent relevant to and supportive of these Second Amended Requests.

- (2) Nor will GESS RNG be engaged in the “construction or operation of any public utility plant . . . directly or indirectly . . .” within the meaning of N.C. Gen Stat. § 62-110(a);
- (3) Nor will GESS RNG be operating a “facility for ... directly or indirectly furnishing ... public utility service” within the meaning of N.C. Gen. Stat. § 62-110.1(a);
- (4) GESS RNG will not be a “utility” within the definition in Commission Rule R6-2(a);
- (5) GESS RNG’s proposed plants, constructed and operated in accordance with this Request (and any Order related thereto), will produce a biogas output from the plants using a “renewable energy resource”, specifically as the output of biomass resources, i.e., animal waste and agricultural waste;
- (6) When used in generation of electric power, the Alternative Gas delivered by GESS RNG in accordance with this Request (and any Order related thereto), will qualify for the production of Renewable Energy Certificates (“RECs”) for use by a qualifying “electric power supplier”, as statutorily defined, to meet the Renewable Energy And Energy Efficiency Standards (“REPS”) of N.C. Gen Stat. § 62-133.8; and
- (7) Provided that the blend of the biomass resources used at each production plant (in accordance with this Request and any Order related thereto) are measured using validated methods to determine the proportion of waste inputs used, that those portions of the gaseous output of the feed stock blend attributed to swine manure or poultry waste shall qualify for RECs suitable for compliance with

the REPS for swine-waste or poultry waste resources, respectively, and that the balance of that output will qualify for general RECs under N.C. Gen. Stat. § 62-133.8(e).

In support of its request for these declaratory rulings, GESS RNG hereby submits the following to the Commission.

PETITIONER

1. GESS RNG is a Delaware corporation authorized to do business in North Carolina, with its principal place of business in Raleigh, North Carolina.

2. Correspondence in connection with this Supplemental and Amended Request should be sent as follows:

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with a copy to Counsel for the Petitioner as follows:

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Petitioner and its Counsel agree to electronic service.

3. The Commission issued its Appendix F Order on June 19, 2018, in Docket No. G-9, Sub 698. Subject to (a) the Commission's approval of this Second Amended Requests, (b) the execution and approval of the final Receipt Agreement(s) to be reached

with Piedmont, and (c) the Order Approving Participation in Pilot Program with Conditions entered on March 11, 2019 in Docket No. G-9, Sub 728 (*Exhibit 4*), approving GESS RNG's pilot plan application and participation (and any subsequent amendments thereto as requested by GESS RNG³ and approved by the Commission); GESS RNG plans to sell and deliver to Duke Energy Carolinas, LLC, on behalf of Duke Energy Progress, LLC ("DEC" and "DEP", respectively), a portion (if not all) of its Alternative Gas, as defined in the Appendix F Order, p.1, note 1, following the construction, testing and commercial operation of twelve (12) proposed anaerobic digester plants and twelve (12) proposed injection facilities in ten (10) different counties of the State.

4. GESS RNG is informed and believes that DEC and DEP are existing customers of Piedmont, and are likely to use the waste-based Alternative Gas produced by GESS RNG using swine waste, agricultural "green waste", and in some instances, poultry waste, to generate electric power in connection with meeting the State's Renewable Energy Portfolio Standards. GESS RNG also plans to sell the associated Environmental Attributes associated with the Alternative Gas to these purchasers of its Alternative Gas.

5. Petitioner, through affiliates, plans to negotiate and enter into Receipt Agreements with Piedmont for twelve (12) injection points on the pipelines of Piedmont to serve twelve (12) bio-digester plants Petitioner plans to develop. As of the date of this filing, the Receipt Agreements with Piedmont have not yet been negotiated, and not all of

³ Contemporaneously herewith, GESS RNG is filing in Docket No. G-9, Sub 728 a Motion to Amend the Order Approving Participation in Pilot Program with Conditions entered on March 11, 2019 in order to expand such Order to include all facilities proposed in this filing.

the twelve proposed injection points have yet been submitted, evaluated, and approved by Piedmont.

6. GESS RNG seeks declaratory rulings as requested herein to address questions regarding the status of GESS RNG as a “public utility”, and regarding certain other issues pertaining to the quantity and types of RECs GESS RNG can expect to obtain from the production plants and operation plans described herein.

7. GESS RNG has informed Piedmont, through counsel, of its intent to file this Second Amended Requests and provided a copy of same prior to its filing.

8. GESS RNG has informed DEC and DEP, through counsel, of its intent to file this Second Amended Requests and provided a copy of same prior to its filing.

SUMMARY OF PROPOSED PLANTS AND OPERATIONS

9. GESS RNG proposes to construct a total of twelve (12) digester plants along with twelve (12) injector facilities in the following ten (10) North Carolina counties: Bladen County (one facility); Brunswick County (one facility); Columbus County (one facility); Duplin County (two facilities); Johnson County (one facility); Pitt County (one facility); Robeson County (one facility); Sampson County (two facilities); Union County (one facility); and Wilson County (one facility). All plants will utilize 560,000 MMBtu (+/- 10%) closed-form anaerobic digesters obtained from Marches Biogas UK, together with a scrubber system that removes up to 99% of impurities, producing a biogas intended to meet or exceed the standards for purity and temperature in Appendix F. To facilitate efficient operations, each plant also will have separate storage facilities for the biogas and other digestate by-products of the GESS RNG plants to allow for on-site storage of each for varying periods of time.

10. Because the digester plants will be installed using a standard, consistent footprint for construction and installation based on numerous systems already installed and in service worldwide. GESS RNG expects the time from commencement of construction to full biogas production to be approximately thirteen (13) months or less. GESS RNG currently estimates that it will invest approximately \$18 million in constructing each digester plant location.

11. Project-specific information as to each of the twelve (12) digester plants is set out below, including for each plant the site location, and the number of projected post-construction jobs required for on-going operations.

- a. Plant: Bladen County Green Energy Biogas Park
Location: Bladenboro
Locally-Based Jobs: 12 Full-Time
- b. Plant: Brunswick County Green Energy Biogas Park
Location: Winnabow
Locally-Based Jobs: 12 Full-Time
- c. Plant: Columbus County Green Energy Biogas Park
Location: Clarendon
Locally-Based Jobs: 12 Full-Time
- d. Plant: Duplin County Green Energy Biogas Park
Location: Chinquapin (2 locations)
Locally-Based Jobs: 24 Full-Time
- e. Plant: Johnson County Green Energy Biogas Park
Location: Bentonville
Locally-Based Jobs: 12 Full-Time
- f. Plant: Pitt County Green Energy Biogas Park
Location: Grimesland
Locally-Based Jobs: 12 Full-Time
- g. Project: Robeson County Green Energy Biogas Park #1
Location: Orrum
Locally-Based Jobs: 12 Full-Time
- h. Plant: Sampson County Green Energy Biogas Park

Location: Salemburg (2 locations)
Locally-Based Jobs: 24 Full-Time

- i. Project: Union County (to be formed as Green Energy Biogas Park Union County, LLC)
Location: Monroe
Locally-Based Jobs: 12 Full-Time
- j. Project: Wilson County (to be formed as Green Energy Biogas Park Wilson County, LLC)
Location: Stantonsburg
Locally-Based Jobs: 12 Full-Time

Once at full production, each plant is projected to produce sufficient Alternative Gas to fill four (4) gaseous tanker trucks per day, containing roughly 1400 Mcf of scrubbed, cleaned, and pressurized, predominantly Alternative Gas, with each processing approximately 170,000 tons/year of swine waste.

12. The GESS RNG plants will not physically connect to the gas pipelines of Piedmont or another pipeline operator. Each plant will have on-site facilities that allow for the pressurization of the gaseous biogas output for on-site storage or injection into pressurized tank trailers and subsequent injection into gas pipelines of Piedmont or another pipeline operator, with separate facilities for the pumping and storage of the remaining digestate output. Both outputs can be safely stored and transported in commercially available tank trailers already in use on a daily basis on the public roads of this State.

13. Through its affiliates, GESS RNG has already obtained (or is in the process of obtaining) fifteen-year lease agreements, with three optional five-year extensions, for each of the twelve digester plants. Assuming construction can commence by or before the second quarter of 2021, GESS RNG forecasts that all of the twelve (12) projects will be able to achieve production of Alternative Gas during the fourth quarter of 2021.

14. With respect to “in-bound” feed stock, GESS RNG or one of its affiliates will handle and manage manure pick-up and delivery to the facilities of GESS RNG from the waste sources. GESS RNG will oversee the gathering, storage, transportation, weighing of trucks and loads, and bio-security activities, including wheel washing systems and tanker spraying systems at each site (including capture and handling of wash-wastes). The “green” biomass feed stock will be delivered by participating farmers using a separate entrance to the facilities of GESS RNG, for deposit into a holding area. GESS RNG personnel will be responsible for moving “green” biomass from the holding area to each digester.

15. Petitioner plans to inject Alternative Gas into Piedmont pipelines at twelve specific injection sites. Alternative Gas from each digester plant will be transported via tanker trucks to twelve injection points in each of the ten counties in which each respective facility is located, and then injected into the Piedmont system at each of the twelve injection points. As of the date of this filing, not all of the twelve proposed injection points have yet been submitted, evaluated, and approved by Piedmont.

16. GESS RNG does not propose or intend to tender for injection into Piedmont’s system physical deliveries or transactions that would violate Piedmont’s applicable tariffs or Appendix F, or that would involve potential interstate sales that may affect the current regulation of Piedmont or the Piedmont pipeline system.

17. GESS RNG has reviewed pipeline boundary maps to help GESS RNG identify the twelve (12) proposed injection points near Piedmont’s pipelines. Using the boundary maps, GESS RNG had identified the areas within which the injection sites may be located in each of the ten (10) counties where facilities are planned to be located: Bladen

County (one facility); Brunswick County (one facility); Columbus County (one facility); Duplin County (two facilities); Johnson County (one facility); Pitt County (one facility); Robeson County (one facility); Sampson County (two facilities); Union County (one facility); and Wilson County (one facility).

REQUEST FOR DECLARATORY RULINGS AS TO “UTILITY” ISSUES

18. GESS RNG respectfully requests the Commission to issue declaratory rulings that GESS RNG’s proposed activities and, through its affiliates, its ownership and operation of the equipment and facilities: (1) will not cause it to be a “public utility” within the meaning of N.C. Gen. Stat. § 62-3(23)(a)(1); (2) will not cause it to be engaged in the “construction or operation of any public utility plant ... directly or indirectly ...” within the meaning of N.C. Gen. Stat. § 62-110; (3) will not constitute owning or operating a “facility for ... directly or indirectly furnishing public utility service” within the meaning of N.C. Gen. Stat. § 62-110.1(a); and (4) will not cause GESS RNG to be a “utility” within the definition in Commission Rule R6-2(a).

19. N.C. Gen. Stat. § 62-3(23)(1) defines a “public utility” as

“[a] person ... owning or operating in this State equipment or facilities for producing, generating, transmitting, delivering or furnishing ... piped gas ... or any other like agency for the production of light, heat or power to or for the public for compensation”.

In *State ex rel. &MO; Commission v. Simpson*, 295 N.C. 519, 246 S.E. 2d 753 (1978), the North Carolina Supreme Court adopted a flexible definition of the term “public” as used in the Public Utilities Act. This Commission has commonly indicated in the context of ruling on requests for rulings similar to these Requests, that the determination of public utility status under this statutory definition, as well as the term “utility” under

N.C. Gen. Stat. § 62-110(a) and 110.1 (a), or under Commission Rule R6-2(a), is flexible. GESS RNG respectfully submits that, on the facts presented here, the construction and operation of the biogas plants for injection of Alternative Gas into the pipelines of Piedmont for delivery to DEC and DEP would not cause GESS RNG to be or deemed to be a “utility” for any purpose.

20. First, the number of direct customers is limited to two entities, each of which is a utility certificated by this Commission. DEC will be purchasing Alternative Gas on its own behalf and on behalf of DEP, an affiliated entity that is likewise a utility certificated by this Commission, for use to generate electricity. These two direct purchasers may opt to purchase the entire output of the proposed plants. These factors indicate that sales to the “public”, as used in the relevant provisions of the Public Utilities Act and the Commission’s rule, would not occur.

21. Second, the Commission has a long history of granting similar declaratory relief to owners and operators of landfill gas, a similar renewable energy resource, based on factors such as the presence of “bargained for” transactions with purchasers that have other energy options, direct sales to an end-user for the production of electric or other forms of energy, and the realization of environmental and other substantial public benefits from making beneficial use of an otherwise wasted resource. *See, e.g., In re Request for Declaratory Ruling of Pitt Landfill Gas, LLC*, NCUC Docket No. SP-100, Sub 13 (March 19, 1997); *In re Request for Declaratory Ruling of Duke Engineering and Services, Inc.*, NCUC Docket No. SP-100, Sub 8 (May 25, 1996); *In re Request for Declaratory Ruling of Wake Landfill Gas Co., LLC and Enerdyne IV, LLC*, NCUC Docket No. SP-100, Sub 9 (July 31, 1996); *In re Request for Declaratory Ruling of Fayetteville Gas Co. LLC*, NCUC

Docket No. SP-100, Sub 6 (May 24, 1996); *In re Request for Declaratory Ruling by Natural Power, Inc. and Raleigh Landfill Gas Corp.*, NCUC Docket SP-100, Sub 1 (December 22, 1988). All of these factors likewise support the relief requested here by GESS RNG.

22. There also will be substantial environmental and other public benefits from making beneficial use of the otherwise wasted “feed stocks” for the biogas digesters, as the closed digester systems to be used in the proposed plants will provide a much more environmentally desirable method for disposal of swine waste than those currently used, and will not only produce opportunities for new revenue streams for the participating farmers, but also substantial economic investments and job opportunities in their nearby rural communities.

23. Third, even if biogas that achieves the requisite characteristics of quality, content and temperature to qualify for treatment as Alternative Gas were considered or concluded to be a utility commodity, biogas from swine and agricultural waste is certainly not “as common a utility function as other services” currently held out to the public, and as noted above, GESS RNG does not propose to hold itself out to the “public”. See, *In the Matter of Request for Declaratory Ruling by Westmoreland-LG&E Partners*, NCUC Docket No. SP-100, Sub 2 (October 13, 1993).

24. Finally, because the biogas plants proposed by GESS RNG are not physically interconnected to any piping system or pipeline other than those within the production plant itself, and will depend instead on delivery to an off-site injection point into pipelines using tanks hauled by motor carriers or other feasible means of conveyance, the biogas will not become “piped gas” as that term is used within the Public Utilities Act

and the Commission's rules, until delivered to the injection point on the pipeline of Piedmont. When determining the regulatory status of the gas, or the production facilities, it is reasonable to place greater weight on the attributes of the biogas purchasers, and the regulated pipeline transportation service, rather than the biogas producer's facilities and equipment and means of conveyance to the off-site injection point of the pipeline.

REQUEST FOR DECLARATORY RULINGS AS TO "REPS"-RELATED ISSUES

25. The specific statutory purposes and public policy goals of the Renewable Energy and Energy Efficiency Portfolio Standards in this State were set out in Senate Bill 3, which amended N.C. Gen. Stat. § 62-2(a) by adding a new subsection (10). This subsection states that it is the policy of this State to promote the development of renewable energy and energy efficiency through the implementation of a REPS that will:

- a. Diversify the resources used to reliably meet the energy needs of consumers in this State;
- b. Provide greater energy security through the use of indigenous energy resources available within the State;
- c. Encourage private investment in renewable energy and energy efficiency; and,
- d. Provide improved air quality and other benefits to energy consumers and citizens of this State.

N.C. Gen. Stat. § 62-2(a)(10). The proposal of GESS RNG involves the use of indigenous "renewable energy resources" – the locally obtained feedstock for the biogas plants. It also will produce substantial private investments in renewable energy, and those investments will provide air quality and other benefits to the citizens of this State, particularly in areas

of the State that have long dealt with swine waste, and which need additional private investments and jobs.

25. Granting the declaratory relief requested by GESS RNG, therefore, will promote several of the goals and public policies of the State. All of the feed stock resources used in the operations of each of the proposed GESS RNG production plants satisfy the definition of a “renewable energy resource”, specifically as a biomass resource. The biogas output of each facility, when used in the production of electric power, should have the environmental and renewable attributes required to qualify for the production of RECs suitable for registration and compliance under N.C. Gen. Stat. § 62-133.8, when power is generated and/or purchased by a qualifying “electric power supplier” from power generation facilities using the biogas.

26. Finally, because the Alternative Gas generated by the GESS RNG plants will flow from the utilization of a blend of swine waste and agricultural crop-waste residuals, or swine waste and agricultural crop waste residuals, plus poultry waste, the environmental attributes for purposes of REC registration and characterization should be determined based on the blend of biomass resources used at each plant.

27. The Alternative Gas produced by the GESS RNG plants are measured at each plant during initial periods of operation, and quarterly or other interval testing thereafter, using validated methods of measure to determine the proportion of swine waste, poultry waste, and “green” agricultural waste inputs used in the production process. The portion of the gaseous output of the feed stock blend attributed to swine manure or poultry waste should be declared to qualify for the production of RECs suitable for compliance

with the REPS requirements for swine waste and poultry waste resources under N.C. Gen. Stat. § 62-133.8 (e).

CONCLUSION

For all of the foregoing reasons, GESS RNG respectfully requests that the Commission issue declaratory rulings that, by virtue of the proposed activities of GESS RNG and its affiliates described above:

(1) GESS RNG will not be a “public utility” within the meaning of N.C. Gen. Stat. § 62-3(23)(a);

(2) Nor will GESS RNG be engaged in the “construction or operation of any public utility plant ... directly or indirectly ...” within the meaning of N.C. Gen. Stat. § 62-110(a);

(3) Nor will GESS RNG be owning or operating a “facility for ... directly or indirectly furnishing ... public utility service” within the meaning of N.C. Gen. Stat. § 62-110.1(a);

(4) GESS RNG will not be a “utility” within the definition in Commission Rule R6-2(a);

(5) GESS RNG’s proposed plants, if constructed and operated in accordance with these Requests (and any Order related thereto), will produce an output of biogas from materials that qualify as a “renewable energy resource”, specifically as the output of biomass resources (i.e., animal waste and agricultural waste);

(6) the Alternative Gas output, when used to generate electric power, qualifies for the production of Renewable Energy Certificates (“RECs”); and

(7) the portion of the biogas output produced at the GESS RNG plants resulting from swine waste and poultry waste, when determined using the relative proportion of

inputs of the feed stock properly measured by use of validated methods and standards of measure, will qualify for use by a qualifying “electric power supplier” to meet the REPS of N.C. Gen. Stat. § 62-133.8(e), including the “set-asides” for RECs from swine waste and poultry waste, and that the balance of that output will qualify for general RECs under N.C. Gen. Stat. § 62-133.8(e).

Respectfully submitted, this the 15th day of February, 2021.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was served this day by U.S. Mail, by depositing a copy of the same in a depository of the U.S. Postal Service in a pre-addressed and postage-prepaid envelop and addressed as shown below, or by providing electronic service to those as shown below:

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This the 15th day of February, 2021.

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